



**U.S. Customs and
Border Protection**

OT: RR: FAPL
H190575MBP

Mr. Jason Smathers
c/o Muck Rock
185 Beacon Street #3
Somerville, MA 02143

NOV 29 2011

RE: Freedom of Information Act Appeal; FOIA No. 2011F01993

Dear Mr. Smathers:

This letter responds your appeal seeking only the documents responsive to your November 10, 2010 to Freedom of Information Act ("FOIA") request that were located during the first two hours of search time. For the following reasons, we agree that you are entitled to those records and remand your request back to FOIA Division for processing.

Procedural History

Because the procedural history regarding this request is both complicated and relevant to our response, we recount it, in detail, here. In your initial request, you sought "All Talking Points and Q&A documents created since January 1, 2009." On November 26, 2010, Customs and Border Protection ("CBP") FOIA Division Director Dorothy Pullo responded to your request stating that the agency "determined that your request is too broad in scope or did not specifically identify the records" you sought and invited you to clarify your request. The letter also explained that the agency would administratively close your request's file if it did not hear back from you within 30 calendar days.

You responded on January 3, 2011, via e-mail – after the 30-day deadline passed – and narrowed your request to cover only the "computer files responsive to a search for 'talking points' on the computers assigned to Maria Luisa O'Connell or any other person directly or indirectly working for her." On January 6, 2011, FOIA Division Branch Chief Elissa Kay agreed to re-open your file, but again sought further clarification of your request. Later that same day, again via e-mail, you further narrowed your request to only those records created on or after January 20, 2009.

On January 10, 2011, Ms. Pullo sent you a letter acknowledging your updated request. In it, she categorized you as a "commercial" requestor and estimated that search, review, and

duplication fees related to your request would total \$672.10. She also asked that you provide a firm commitment to pay those estimated fees, warning that the agency would not begin its work responding to your request without one, and explained that you could pay those fees at any time. The next day, on January 11, 2011, Ms. Pullo sent another letter to you warning that the agency may encounter some delay in processing your request, noting that your request would likely span "numerous documents" and "necessitate a thorough and wide-ranging search." She noted that because of that expected delay and as allowed by 5 U.S.C. §552(a)(6)(B), CBP would be invoking a 10-day extension to the 20-day statutory limit in responding to your request.

More than six weeks later, on February 28, 2011, you challenged the Ms. Pullo's decision to categorize you as a "commercial" requestor, arguing that you had "absolutely no commercial interest" in the request and that the request "was for news media purposes." You also invited the agency to contact you if it required "additional information concerning my status as a member of the news media." That same day, CBP FOIA Division sent you an e-mail requesting the same in order to allow it to make a proper determination regarding your requestor category.

Exactly two months later, on April 28, 2011, you explained that you had a "track record publishing news stories" for www.witnessesuntome.com and intended to turn any documents obtained from your request into a unique work using your editorial skills. On May 6, 2011, Ms. Pullo responded to your assertion that you had no commercial interest in the records. She denied your request to be considered as a representative of the news media, but reclassified you as an "all other" requestor, explaining that such a categorization entitled you to two hours of free search time and 100 free pages of duplication. She then calculated your fees to total \$90.40: two hours of professional search time (provided for free), two hours of managerial search time at \$41 per hour (\$82.00), 100 pages of duplicated records (provided for free), and 84 pages of duplicated records (\$8.40). She provided you 30-days to accept that fee arrangement and further explained that, pursuant to 6 C.F.R. §5.1(a) and (i), the agency would require payment of those fees before releasing your responsive records.

FOIA Division received neither payment nor any other contact from you for more than four months later until, on September 13, 2011, you sent an e-mail to the CBP FOIA mailbox arguing that the agency "failed to respond in a timely manor" (*sic*) and therefore the FOIA no longer permitted it to assess search fees in responding to your request. Ms. Pullo responded to your e-mail on September 20, 2011, explaining that the delay in processing and releasing your records could be traced back to your own delays. Specifically, she recounted the above described delays in clarifying and narrowing the scope of your request and supporting your claim for preferred requestor status. Although your file was administratively closed due to your extensive delay in responding to her May 6, 2011 letter, Ms. Pullo offered to re-open your case file. She did warn, once again, that no records would be released until the agency received full payment for the fees assessed, \$90.40.

The agency again neither received payment nor heard any other response from you. Instead, on October 23, 2011, you sent another e-mail asking that FOIA Division provide you with the

documents found in the first two hours of search time. That e-mail was interpreted as an appeal and forwarded to my office for review.

Your September 13, 2011 E-mail

Insofar as your September 13, 2011 e-mail could be construed as an appeal, it is denied.¹ You are correct to note that the agency cannot search charge fees to “all other” requestors after failing to adhere to the statutory deadlines imposed in the FOIA. See 5 U.S.C. §552(a)(4)(A)(viii). However, we find that your repeated and lengthy delays not only caused, but tolled those deadlines.

To begin, we note that the agency had 30 days, excepting Saturdays, Sundays, and legal public holidays, to respond to your request. Ordinarily, the FOIA imposes a strict 20-working-day deadline on agencies to process requests. 5 U.S.C. §552(a)(6)(A). However, it also allows for an extension of those deadlines in three specifically described “unusual circumstances.” 5 U.S.C. §552(a)(4)(B)(i). In her January 11, 2011 letter to you, Ms. Pullo wrote to extend the FOIA’s statutory deadlines 10 additional days, describing the need to conduct a “thorough a wide-ranging search” for records. A review of the file indicates that invocation was proper as the records you sought were located in “field facilities or other establishments that are separate from the office processing the request.” 5 U.S.C. §552(a)(4)(B)(iii)(I).

To determine whether that 30-day deadline lapsed, it is important to review each piece of correspondence recounted in detail above. The timeline for response begins on the day the agency received your request, November 10, 2010. 5 U.S.C. §552(a)(6)(A)(ii).

After receipt of your request, 11 days elapsed before Ms. Pullo requested a clarification of your request on November 26, 2010. These 11 day do not count Saturdays, Sundays, or the Thanksgiving holiday. That letter tolled the statutory deadlines pursuant to 5 U.S.C. §552(a)(6)(A)(ii)(I), which allows the agency “one request to the requestor for information and toll the 20-day period while it is awaiting such information that it has reasonably requested from the requestor under this section.” You clarified your request on January 3, 2011 and then further narrowed it on January 6, 2011.

On January 10, 2011, after another four working days elapsed, Ms. Pullo mailed you a fee letter classifying you as a commercial requestor and seeking advanced payment of the total calculated fees of \$672.10, a practice authorized by 5 U.S.C. §552(a)(4)(A)(v) and 6 C.F.R. §5.11(i)(2), both of which allow for the charging of advanced fees when estimated fees exceed \$250. This letter again tolled the statutory deadlines of the FOIA as it shifted the onus on you to submit payment before the agency processed your records. On February 28, 2011, you replied to Ms. Pullo’s fee letter requesting preferred requestor status as a representative of the news media. That same day, CBP responded seeking further evidence and clarification to determine whether you were entitled to such status. This response again tolled the statutory

¹ To be clear, even though it contained the phrase “I appeal,” FOIA Division did not interpret your September 13, 2011 e-mail as an appeal and did not forward it to this office. Nevertheless, we address that e-mail in this response in the interest of thoroughness.

deadlines, this time pursuant to 5 U.S.C. §552(a)(6)(A)(ii)(II), which tolls those deadlines “if necessary to clarify with the requestor issues regarding fee assessment.” You clarified your qualifications as a representative of the news media on April 28, 2011.

Six more working days then passed before Ms. Pullo sent you the May 6, 2011 fee letter, categorizing you as an “all other” requestor, notifying you that the total fees related to your request totaled \$90.40, and providing you 30-days to accept that fee arrangement or pay those fees. Although the FOIA specifically proscribes advanced payment of any fee, see 5 U.S.C. §552(a)(4)(A)(v), Department of Homeland Security (“DHS”) regulations explain that “in cases in which a requestor has been notified that actual or estimated fees amount to more than \$25.00, the request shall not be considered received and further work shall not be done on it until the requestor makes a firm commitment to pay the anticipated total fee.” 6 C.F.R. §5.11(e).

You did not respond to Ms. Pullo’s letter until your September 13, 2011 e-mail claiming that the agency’s delay prohibited it from charging search fees. We disagree with that contention. At best, the 30-day extended timeline for response was never reached. Only 21 days elapsed. At worst, your failure to provide a firm commitment to pay the assessed fees as required by DHS regulations allows the agency to treat your request as if it had never been received. As such, insofar as your September 13, 2011 e-mail could be construed as an appeal, it is denied.

Remand to FOIA Division for Processing

After careful review of your file, we agree that you are entitled to the records identified during the first two hours of search and remand to FOIA Division for processing. Your October 23, 2011 e-mail seeking only those records identified in the first two hours of search time limits the fees related to your request to below \$25.00 and enables FOIA Division to process your request. However, in her attempts to proactively respond to your request in a timely and prompt manner, Ms. Pullo already conducted a full and complete search for all records that would respond to your request. That search identified 184 pages of records over the course of four hours.

Because it is impossible to differentiate the records found in the first two hours and the last two hours of that search, in the interests of fairness and equity we are directing FOIA Division to produce to you one-half of the total universe of documents, or 92 total pages of records.


Right to Judicial Review

In the event that you are dissatisfied with the disposition of your appeal, you may obtain judicial review of this decision pursuant to the provisions of 5 U.S.C. §552(a)(4)(B) in the United States District Court in the District in which you reside, in the District where the agency records are situated, or in the United States District Court for the District of Columbia.

The Office of Government Information Services (OGIS) also mediates disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. If you are requesting access to your own records (which is considered a Privacy Act request), you

should know that OGIS does not have the authority to handle requests made under the Privacy Act of 1974. If you wish to contact OGIS, you may email them at ogis@nara.gov or call 1-877-684-6448.

Sincerely,

A handwritten signature in black ink, appearing to read 'Shari Suzuki', written in a cursive style.

Shari Suzuki, Chief
FOIA Appeals, Policy and Litigation Branch